Supreme Court, U.S.
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No. 98-2027

IN THE

Supreme Court of the United States

October Term, 1998

BARTHOLOMEW J. LAWSON and NANCY A. LESTER,

Petitioners,

-against-

ROBERT ABRAMS, former Attorney General of New York State, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should review a unanimous ruling of the United States Court of Appeals for the Second Circuit that it had no reason to question a statement of the district court judge, in upholding a Magistrate Judge's report and recommendation, that it complied with 28 U.S.C. § 636(b)(1), having "read and reviewed the record in this matter de novo."

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STATEMENT OF THE CASE

A. Factual and Procedural Background

The Parties

Plaintiff Bartholomew J. Lawson was a principal in the Lawson Life Extension Institute, which became the receiver of the Haym Salomon Nursing Home ("Home") in March 1980 (A170).[1] Lawson was later indicted by a grand jury for conspiracy in the fourth degree, falsifying business records in the first degree, offering a false instrument for filing in the first degree and criminal solicitation in the fourth degree (A343). On February 25, 1983, Justice Aronin, in Supreme Court, Kings County, dismissed Count 1 and Count 6 of the indictment with leave to the special prosecutor to resubmit to the grand jury. The court upheld the other counts (A356-366).

On May 4, 1983, the prosecutor presented the entire case against plaintiff Lawson to a new grand jury which indicted him on the same six counts as were contained in the original indictment (A373). Plaintiff Lawson's motion to dismiss the indictment was denied by Justice Goldstein on July 27, 1983 (A383-394). On November 4, 1983, Mr. Lawson was found not guilty of all charges (A1154).

Plaintiff Nancy A. Lester was a principal in Lawson-Burich Associates. She was formerly married to plaintiff Bartholomew Lawson.

Defendant Robert Abrams served as Attorney General when plaintiff Lawson was indicted.

---

[1] Numbers in parentheses preceded by "A" refer to pages in the Joint Appendix.

Defendant Judith Berek served as Director of Legislative and Professional Programs for District (Local) 1199 of the National Union of Hospital and Health Care Employees (A158-159).

Defendant Stephen J. Calvaca was a prosecutor assigned to the Office of the Special Prosecutor ("OSP") and conducted an investigation into the alleged criminal activities of Bartholomew J. Lawson (A1185).

Defendant Leon Davis was president of District (Local) 1199 in the 1980's. Mr. Davis is now deceased (A143).

Defendant Philip Witkower was assistant to Leon Davis when he was president of District (Local) 1199 in 1980 (A155). He hired Diane Savage, formerly Diane Iandoli, as Director of Research (A155-157).

Defendant Edward L. Kay served as Vice President of District (Local) 1199 and asked Diane Savage to assist the Union in its investigation of the Woodhull Nursing Home with respect to violations of the National Labor Relations Act (A153-154).

Defendant Joseph Lombardo was a principal auditor investigator in OSP and Deputy Attorney for Medicaid Fraud Control in the 1980's (A475-477).

Defendant Diane Savage was employed as a Director of Research by the National Union of Hospital and Health Care Employees in the 1980's (A147). Her responsibilities included investigating Union busters and those employers resisting bargaining with unions and violating collective bargaining agreements (A147-152). After learning from sources associated with plaintiff Lawson that he had hired Mayer Bendet to blow up a Union trailer for $5,000, she brought this information to the

attention of the OSP and assisted the OSP in its investigation (A149).

Defendant James Scaringe in 1978 joined the Office of the Special Prosecutor and served as Deputy Attorney General for Medicaid Fraud (A464). He was present during three interviews with Mayer Bendet and was responsible for memorializing the substance of the interviews (A465).

Defendant Doris Turner was Executive Vice President of District (Local) 1199 during 1980-1982 (A160). In 1982, she succeeded Leon Davis as President (A160).

Defendant Barry Friedman served as Deputy Attorney General for Medicaid Fraud Control (A472).

Defendant Eugene Nachamkin was a consultant for the Haym Salomon Home (A138).

The Plot to Bomb Local 1199's Trailer

In March, 1980, plaintiffs Bartholomew J. Lawson and Nancy Lester and Joyce M. Burich became receivers of the Haym Salomon Home for the Aged through a corporation known as Lawson-Burich Associates (A170). Lawson-Burich entered into a separate agreement which provided that it would become the owner of the Home on certain terms and conditions, including the receipt by Lawson-Burich of a permanent operator's license (A185).

Shortly after Lawson-Burich assumed control of the Home it discharged most of the District 1199 employees, which were primarily blue collar health care workers. This dismissal precipitated a job action by the Union. The Union picketed the Home and set up headquarters in a trailer nearby.

On or about May 7, 1980, the Home's management, including Lawson, met to discuss the ongoing labor dispute. The discussion focused upon a plan to dispose of the Union trailer. Lawson summoned Mayer Bendet to the Home. It was agreed that Bendet would blow up the Union trailer in exchange for a fee of $5,000 (A220-221). A check for $5,000 was drawn on the Home's account and made payable to Bendet's printing company, "Type and Print" (A221). Bendet cashed the check the following day. Bendet never bombed the trailer; nor did he do anything else in return for the $5,000.

The next year the Union commenced an investigation into Lawson's anti-union activities. Lawson's former associates, Israel Fogel, Aaron Elbogen, and Eugene Nachamkin, advised members of the Union about the bombing plot. The Union brought this allegation, among others, to the attention of the OSP. The Union defendants assisted the OSP in their investigation of the allegations. On about four occasions, Diane Savage, at the request of the OSP, interviewed informants wearing a concealed listening device (A149).

The OSP advised the Union that it may not have jurisdiction unless the Home submitted $5,000 for Medicaid reimbursement. Although the Home had sent a request for an invoice to Bendet, Bendet ignored it. The OSP had Bendet come to its offices to call Lawson to determine whether Lawson wanted him to submit an invoice to the Home for reimbursement. In a recorded conversation, Lawson instructed Bendet to submit an invoice indicating that he had performed work as a community consultant (A467). Bendet prepared the invoice under the supervision of the OSP and delivered it to the Home.

The OSP obtained from Fogel a copy of a Medicaid cost report which had been already filed with the New York State Department of Health (A317, A469, A554). According to the OSP, this cost report contained a $5,000 request for reimburse-

ment in a strike expense category. The OSP determined that the $5,000 in the cost report was the same $5,000 check handed to Bendet on May 7, 1980. On that basis, the OSP decided to present the case to a grand jury and seek an indictment (A442).

Grand Jury Testimony Results in Plaintiff Bartholomew Lawson's Indictment

The grand jury indictment of Bart Lawson resulted not from any Union official testifying but from testimony of associates of Mr. Lawson. At the grand jury hearing, Mayer Bendet testified that Lawson told him to blow up the Union trailer:

> Q. What was the indication from Mr. Lawson as to what you would do for the $5,000?
>
> A. To get rid of the Union.
>
> Q. By what means?
>
> A. Mr. Lawson himself?
>
> Q. Yes.
>
> A. What was going through his mind?
>
> Q. No. What did he state to you?
>
> A. To blow up the trailer (A220-221).
>
> * * *
>
> Q. Did it ever come from [Lawson's] mouth at any point that you should, in fact, blow up the trailer for $5,000?

A. Yes, it came from his mouth (A222).

* * *

Q. What did he say you should do for the $5,000 after this entire discussion had terminated? What was his last words to you with respect to what service you should render for that $5,000?

A. Blowing up the trailer (A223).

* * *

Q. Did you, in fact, receive a check for $5,000 drawn on the account of the Lawson Life Extension Institute during the course of that meeting on May 7, 1980?

A. Yes, I did.

Q. Based on what was told to you by Mr. Lawson at that time, what did he suggest that you should do in return for this $5,000?

A. To blow up the truck.

* * *

Q. Did he ever call you up –

A. No.

Q. -- and suggest to you what he told you that night was, in fact, something other than what he intended?

A. No (A224-25).

* * *

Q. With respect to the trailer, in exchange for the $5,000 what did [Lawson] tell you?

A. "To blow it up."

* * *

Q. Did he ever tell you anything or have another person on his behalf tell you anything to, in effect, rescind his direction to you to blow up the trailer in exchange for $5,000?

A. He did not (A226-227).

Summary Judgment Motions Dismissing the Complaint

The Union defendants moved for summary judgment under Fed.R. Civ., P. 56(b), arguing that they did not act under color of law, did not institute a criminal proceeding against the plaintiff, and that there was probable cause to believe that plaintiff Lawson had committed a crime based on the grand jury testimony of Mayer Bendet, Israel Fogel and Haim Stern (A129-146).

The State defendants also moved for summary judgment (A433-934).

Plaintiffs' Opposition

Plaintiffs vigorously opposed the summary judgment motions, claiming that plaintiff Lawson's indictment was a result of a "conspiratorial agreement between Leon Davis, president of Union (Local) 1199 and Attorney General Robert Abrams to prosecute Lawson and wreck him in the health care industry" (A957).

Plaintiffs further contended that the Union defendants invented the story that Lawson had engaged in a plot to bomb the Union trailer and that discovery has revealed "there existed no plot to bomb the Union trailer" (A958). Moreover, plaintiffs argued that the Union defendants "did not have probable cause to believe that there was a plot to bomb the trailer" (A959).

Magistrate-Judge Mann's Report and Recommendation

In a 64-page report (A1293-1356), Magistrate-Judge Roanne L. Mann recommended that "defendants' motions be granted and judgment entered in favor of defendants, dismissing plaintiffs' complaint" (A1293). The exhaustive and comprehensive opinion included many recommendations:

> ¶ Plaintiff Lawson lacked standing of being deprived of his continued operation of the Lawson Institute because he relinquished his interest in the corporation before DOH's decision to terminate the receivership and PHC's initial decision to deny the establishment application (A1305);
>
> ¶ State defendants Abrams, Kuriansky, Berlowitz, Calvaca and Friedman are entitled to absolute immunity from the malicious prosecution claim and claims relating to the presentation to the grand jury (A1306-1309);

¶ The State defendants are entitled to qualified immunity with respect to plaintiffs' allegations of disclosure of grand jury information and illegal wiretaps (A1311);

¶ Plaintiffs' § 1983 claims against the State defendants and Union defendants other than Diane Savage for lack of personal involvement in any of the alleged violations should be dismissed (A1313-1318);

¶ Plaintiffs' § 1983 claims against the Union defendants including Diane Savage, for lack of proof that they acted under color of State law should be dismissed (A1318-1320);

¶ No genuine issue of fact is presented with respect to illegal tape recordings of plaintiff Lawson by any of the defendants other than Diane Savage (A1328);

¶ Plaintiffs have no malicious prosecution claim because the "two grand juries returned indictments charging Lawson with conspiracy to commit arson, falsifying business records, filing a false instrument and criminal solicitation" created a "presumption of probable causes to both the arson and the medicaid fraud" (A1330-1332);

¶ Plaintiff Lawson failed to overcome "the strong presumption of probable cause arising" from his indictments (A1335);

¶ Plaintiffs' allegations of coercion by the defendants and bribery on the part of Elbogen was insufficient to overcome the strong presumption of probable cause created by the two grand jury indictments of Lawson (A1335-1344);

¶ Defendants are entitled to summary judgment dismissing plaintiffs' allegations for deprivation of property under § 1983 because there was lack of certainty whether the Lawson Institute would have continued in its position as receiver and the grant of discretion to PHC (A1344-1345);

¶ Plaintiffs failed to support allegations of being deprived of the right to fair judicial proceedings as evidence of acts of interference by the State or Union defendants (A1346); and

¶ Declining to exercise supplemental jurisdiction over the remaining State claims including malicious prosecution, abuse of process, interference with prospective advantage and with contract and defamation (A1347).

Should the district court exercise supplemental jurisdiction, Magistrate-Judge Mann recommended the following:

¶ Dismissal of plaintiffs' malicious prosecution claims because the State defendants were entitled to absolute immunity and plaintiffs failed to rebut the presumption of probable cause (A1347-1348);

¶ Dismissal of plaintiffs' abuse of process claim for failing to demonstrate any abuse or perversion of any process after it was issued (A1348-1350);

¶ Dismissal of plaintiffs' claim for intentional interference with the contractual relations finding that the contract was "in no way breached" (A1350-1351); and

¶ Dismissal of plaintiffs' claim for interference with prospective advantage, finding that the Union had a clear

> interest in improving its members' employment and that plaintiffs' allegations are of actions far too attenuated to satisfy the "high standard" of causation required to sustain such a claim (A1351-1354).

Judge Amon's Memorandum and Order Granting Defendants' Motions to Dismiss Plaintiffs' Complaint

After plaintiffs filed their objections to Magistrate-Judge Mann's report and recommendations, Judge Amon undertook a *de novo* review. Judge Amon adopted the findings and recommendations in the report and granted defendants' motions for summary judgment in its entirety after

> having read the Report, plaintiffs' objections, defendants' responses, and plaintiffs' replies, and having read and reviewed the record in this matter *de novo* (A1407).

Judge Amon concurred with Magistrate-Judge Mann's conclusion concerning the malicious prosecution claim under § 1983 and dismissed it because the State defendants were protected by absolute immunity and plaintiffs failed to show personal involvement on the part of the Union defendants; and failed to establish lack of probable cause (A1409).

Judge Amon also stated another reason for the dismissal of the malicious prosecution claim. The court found that plaintiff Lawson failed to allege that he was deprived of his liberty, a *sine qua non* for a malicious prosecution action under § 1983 based upon the Second Circuit's ruling in Singer v. Fulton County Sheriff, 63 F.2d 110. The district court observed:

> Plaintiffs' claim also fails because they have not alleged how defendants' actions violated Law-

> son's Fourth Amendment right to be free from unreasonable search and seizure or provided an alternative basis for a malicious prosecution claim under § 1983. In any event, even if a Fourth Amendment violation could be divined from the numerous legal submissions in this case, or rectified by a repleading of the complaint, this claim fails for the additional reasons articulated in the report (A1409-1410).

In addition, the district court rejected Magistrate-Judge Mann's recommendation that it decline to exercise supplemental jurisdiction, ruling that "it is appropriate to exercise supplemental jurisdiction over State law claims" (A1410). Having exercised supplemental jurisdiction, the district court held that defendants were entitled to summary judgment on plaintiffs' State law claims for malicious prosecution, abuse of process, intentional interference with contractual relations, interference with prospective advantage and defamation (A1410).

The Court of Appeals' Affirmance

The Court of Appeals for the Second Circuit affirmed, in a Summary Order,[2] the order of the district court granting defendants summary judgment The court unanimously rejected plaintiffs' argument that the district court did not make a *de novo* determination:

> Judge Amon's opinion expressly states that the district court, "having read the Report, plaintiffs' objections, defendants' replies, and having read and reviewed the record in this matter de novo, adopts the findings and recommendations in the

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[2] The Order is reproduced in Petition for Writ of Certiorari at 2a-6a.

> Report and grants defendants' motion for summary judgment in its entirety." We have no reason to question that all this was done, and we decline to impose the requirement that a district court parrot each finding and recommendation that it chooses to adopt (Petition at 4a).

The court also found that plaintiffs' § 1983 claim alleging malicious prosecution failed for inability to prove lack of probable cause and that defendants did not commit any unconstitutional violations or state law torts. The court also held that there was no claim for § 1983 violation for unreasonable search in the complaint.

Finally, the court concluded that the district court correctly decided the issues of conspiracy and lack of probable cause especially since the grand jury indictment created the presumption of probable cause that was not overcome by "evidence that the indictment was the product of fraud, perjury, the suppression of evidence, ... or other police conduct undertaken in bad faith (Petition at 5a-6a).

REASONS FOR DENYING THE PETITION

This case does not raise new issues concerning review by the district court of a magistrate judge's findings. The issues raised were settled by this Court long ago in United States v. Raddatz, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424, *reh'g denied*, 448 U.S. 916, 101 S.Ct. 36, 65 L.Ed.2d 1179 (1980).

To deal with *de novo* review, this Court has developed clear principles that have been faithfully adhered to. *De novo* review of a magistrate judge's recommended disposition simply means, according to *Wright, Miller & Marcus, Federal Practice and Procedure Civil 2d.*, §3070.2 (378-9):

> At a minimum, it is clear that the district judge is not required to approach the question raised on a dispositive motion in a totally fresh fashion without giving any weight to the views of the magistrate. At the same time, there can be no plausible argument that the district judge must accord any weight at all to the recommendations or findings of he magistrate judge. Whether or not a district court may sometimes be powerless to alter a magistrate judge's decision of a nondispositive matter, the discretion Article III requires with respect to dispositive matters permits the district judge to decide such an issue in any way he or she deems proper, and to reject, or pay no attention whatsoever to, the magistrate judge's findings.

To grant certiorari in this case would result in a restatement of settled law and would be of little benefit except to the parties to this suit. The scarce resources of this Court should not be devoted to matters of such limited utility.

Petitioners raise two issues in their petition: (a) what constitutes a proper *de novo* review of a magistrate judge's findings since there is a conflict among the circuits; and (b) whether the circuit court is required by statutory and constitutional principles to review the decision of the district court under the "independent" or "plenary" standard or the "clear error" standard.

Both issues are actually no issues: there is no conflict among the circuits concerning the meaning of "*de novo*" review and the circuit court correctly reviewed the decision of the district court.

A. The District Court Correctly Conducted a *De Novo* Review

To satisfy *de novo* review under 28 U.S.C. § 636(b)(1)(e) a district judge must review and consider the evidence presented to the magistrate judge. This is a "threshold requirement." (See, U.S. v. Remsing, 874 F.2d 614, 618 [9th Cir. 1989]). There is no requirement that the district court rehear witnesses. As the Court stated in Raddatz:

> To construe § 636(b)(1) to require the district court to conduct a second hearing whenever either party objected ... would largely frustrate the plain objective of Congress to alleviate the increasing congestion of litigation in the district court. We cannot impute to Congress a purpose to paralyze with one hand what it sought to promote with the other (477 U.S. at 675-676, 100 S.Ct. at 2412).

In Raddatz, the district judge stated that he considered the transcript of the hearing before the magistrate, the parties' proposed findings of fact, conclusions of law and supporting memoranda, the written recommendations of the magistrate and the oral argument of counsel. This was an acceptable *de novo* review for the United States Supreme Court. Thus, where the district court judge stated that a review has occurred, as in Raddatz, that statement should suffice unless there "is affirmative evidence indicating that a *de novo* review was not performed" (Jones v. Pillow, 47 F.3d 251, 253 [8th Cir. 1995]). See, for example, Andrews v. Deland, 943 F.2d 1162, 1171 (10th Cir. 1991), *certiorari denied*, 502 U.S. 1110, 112 S.Ct. 1213, 117 L.Ed.2d 451 (1992) [the court will not look behind district court's expressed statement that it engaged in a *de novo* review of the record]; Murphy v. International Bus. Mach. Corp., 23 F.3d 719, *certiorari denied*, 513 U.S. 87, 115 S.Ct. 204, 130

L.Ed.2d 134 (1994) [brevity of the district court's order is an insufficient reason to justify reversal of the district court's order especially where the magistrate judge made a comprehensive recommendation]; U.S. v. Hamell, 931 F.2d 466, 468, *certiorari denied*, 503 U.S. 928, 112 S.Ct. 347, 116 L.Ed.2d 286 (1994) [order affirmed although district court failed to specify that he or she reviewed the record]; Hosna v. Groose, 80 F.3d 298 (8th Cir. 1996) [district court presumed to have made a *de novo* review unless affirmative evidence demonstrates otherwise].

Where there is affirmative evidence indicating that *de novo* was not performed, such as where the transcript had not yet been prepared, the Court of Appeals will find that the required review was not performed (Branch v. Martin, 886 F.2d 1043 [8th Cir. 1989]).

Petitioners cite a number of cases. None of them, however, demonstrate any conflict between the circuits. In Hill v. Duriron Co., Inc., 656 F.2d 1208 (6th Cir. 1981),[3] the district court ruled without sections of a 1,000-page transcript, which were "essential to rule on [plaintiff's] objections." It therefore did not receive "the judicial attention which Article III of the Constitution requires" (Id. at 1215). Similarly, in Hernandez v. Estelle, 711 F.2d 619 (5th Cir. 1983),[4] the magistrate's recommendation was based on conflicting testimony. The district court had to conduct a *de novo* review of the testimony itself to comply with § 636(b)(1)(B). Such a review, however, was not possible because the transcript of the hearing was not available. Accordingly, the Court of Appeals remanded the case back to the district court to conduct a *de novo* determination of those portions of the magistrate's report to which objection was made (Id. at 620).

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[3] Petition at 13.

[4] Petition at 13.

In Orpiano v. Johnson, 687 F.2d 44 (4th Cir. 1982),[5] the district court held that a *de novo* determination of the portion of plaintiff's objections were unnecessary because "the magistrate report is thorough and relevant to the issues presented." This was error because plaintiff specifically challenged the magistrate's proposed factual findings.

Finally, in Equal Employment Opportunity Commission v. Keco Industries, Inc., 748 F.2d 1097 (6th Cir. 1984),[6] the district court had reviewed the magistrate's findings under the "clearly erroneous" standard rather than according them a *de novo* review (Id. at 1099).

Absent any affirmative evidence that a *de novo* review was not performed by the district court, the court should not look behind a district court's express statement that it engaged in a *de novo* review of the record. The magistrate judge's report and recommendations were exhaustive and detailed. It covered every issue raised. Unless the district court was reversing the magistrate judge, there was no need for a lengthy opinion.

The district court here followed the cogent observation made by the Seventh Circuit in U.S. v. Rodriguez, 888 F.2d 519, 521 (7th Cir. 1989):

> When the district judge, after reviewing the record in the light of the objections to the report, reaches the magistrate's conclusions for the magistrate's reasons, it make sense to adopt the report, sparing everyone another round of paper.

Contrary to petitioners' contention, there are no conflict-

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[5] Petition at 13.

[6] Petition at 13.

ing positions between the circuit courts on *de novo* review. The district court judges in Hill v. Duriron Co., Inc., 656 F.2d 1208, 1215 (6th Cir. 1981), Hernandez v. Estelie, 711 F.2d 619, 620 (5th Cir. 1983), Orpiano v. Johnson, 687 F.2d 44 (4th Cir. 1982) and Branch v. Martin, 886 F.2d 1043 (1989), could not have reviewed the record *de novo* because the transcripts had not been submitted to them.

B. There Are No Conflicts Between the Circuits Concerning the Standard of Review of a District Court's Review of a Federal Magistrate Judge's Report.

The standard of review by the circuit courts are not in conflict concerning the standard applied to reviewing a district court's review of a magistrate judge's report. The circuit courts of appeal generally review applications of law to the facts *de nova* and findings of facts for clear error. See Stanley v. Herjirika, 134 F.3d 629 (4th Cir. 1998). This is the prevailing standard of review; Cumbie v. Singletary, 991 F.2d 715, 719, *certiorari denied*, 510 U.S. 1031, 114 S.Ct. 650, 126 L.Ed.2d 608 (1993), [the standard of review for factual findings is clear error and *de nova* review for conclusions of law]; Grimsley v. Mackay, 93 F.3d 676, 679 (10th Cir. 1996) [court applies clearly erroneous standard to the magistrate judge's findings of fact and reviews de novo questions of law and mixed questions of law and fact]; Tamez v. City of San Marcos, Texas, 118 F.3d 1085, 1091 (5th Cir. 1997) [*de novo* review of magistrate judge's legal conclusions].

Although the Second Circuit Court of Appeals did not set forth the standard of review it applied, Petitioners cannot seriously argue that the circuit court did not conduct an "independent" or "plenary" review. The court set forth plaintiff's arguments and the reasons why it rejected them. The court's opinion demonstrates that it applied the correct standard of

review. As noted by the Seventh Circuit Court of Appeals in U.S. v. Rodriguez, 888 F.2d 519, 521:

> Rodriguez treats adoption of the magistrate's report as a sign that he has not received his due. Yet, we see no reason to infer abdication from adoption. On occasion this court affirms a judgment on the basis of a district court's opinion affirming by adoption does not imply we have neglected our duties; it means, rather, that after independent review we came to the same conclusions as the district judge for the reasons that judge gave, rendering further explanation otiose. When the district judge, after reviewing the record in light of the objections to the report, reaches the magistrate's conclusions for the magistrate's reasons, it makes sense to adopt the report sparing everyone another round of paper.

Petitioners' second reason does not merit granting certiorari by this Court.

D. The Decision of the Court of Appeals was Not Erroneous.

In a desperate attempt to seek review, petitioners argue that the Court of Appeals' decision is erroneous. This argument is not a "compelling" reason for granting a Petition for Writ of Certiorari under Rule 10 of this Court's rules:

> A petition for a writ of certiorari is rarely granted when the asserted error consist of erroneous factual findings or the misapplications of a properly stated rule of law.

In addition, the magistrate judge correctly resolved factual questions.

Petitioners argue that the magistrate judge and the district court erred by finding that there was uncontradicted evidence that Israel Fogel illegally obtained the document from an official of the nursing home, Joyce Burich (A939). Petitioners criticize this finding, claiming that the magistrate judge overlooked the deposition testimony by Fogel where he stated: "This is the cost report that I got from Joyce's desk," which petitioners interpret as proof that he stole the papers. Petitioners also cite Justice Bernstein's finding that "Fogel did remove papers from the office of the Nursing Home Association" but fail to include the next sentence which is critical:

> These papers had already been filed with the Department of Health and would have been available to the Special Prosecutor in any event (A400).[7]

The circuit court was also correct that plaintiffs did not plead a cause of action for unreasonable search (5a). Paragraph 78 of petitioners' complaint is 34 lines and is a detailed recitation of what they claim occurred. However, petitioners' first claim for relief under 42 U.S.C. § 1983 alleges violations for false imprisonment; arrest; malicious prosecution; fair trial and judicial proceedings. There is no specific claim for a violation of unreasonable search (A78-79).

Finally, the Summary Order is not in conflict with this Court's decision in Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). The district court correctly concluded that plaintiffs' "evidence" of the claimed conspiracy between the State and the Union defendants was insufficient because it was based on conclusory allegations,

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[7] Fogel gave Savage the cost report on July 21, 1981 (A469). But this report had already been filed almost a week earlier (A469, A554, A400)).

conjections, and speculations. In Adickes there was circumstantial evidence presented favorable to plaintiffs. Petitioners here do not cite any circumstantial evidence in the record supporting a jury verdict in their favor on the conspiracy issue. Petitioners' argument confuses the circumstantial evidence present in Adickes with the pure unfounded corclusory assertions and speculation presented here. Although the court must resolve any factual issues raised in a summary judgment motion in favor of the non-moving party, such resolution is required "only in the sense that, where the facts specifically averred by the non-moving party contradict facts specially averred by the movant, the motion must be denied" (Lujan v. National Wildlife Federation, 497 U.S. 871, 888, 110 S.Ct. 3117, 111 L.Ed.2d 695 [1990]) (emphasis supplied). Conclusory allegations in affidavits or other evidence submitted in opposition to a summary judgment motion are insufficient to raise a factual dispute. The object of Rule 56(e) "is not to replace conclusory allegations of the complaint or answer with conclusory allegations in affidavit." Id.

Finally, petitioners argue that theissue of probable cause was for the jury because there was conflicting evidence (Petition at 23-24, citing Rounseville v. Zahl, 13 F.3d 625 [2nd Cir. 1994]). However, in Rounseville, there was no indictment giving rise to a presumption of probablecause. See 13 F.3d at 627. Furthermore, the conflicting testinony in that case went not to probable cause, but to whether the underlying criminal prosecution had terminated in plaintiffs' favor, a prerequisite to a malicious prosecution claim separate from the probable cause prerequisite. That issue was not involvel in this appeal.

CONCLUSION

The issues raised in the petition have been previously settled by this Court. There is no conflict among the circuits concerning these principles and the Court of Appeals in this case properly applied them. Accordingly, there is no basis upon which this Court should grant certiorari. This Court should deny petition.

Respectfully Submitted,

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